Supreme Court U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

JUDY LEHMAN and MARK LEHMAN, wife and husband,

Petitioners,

-v-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. May a federal court interpret 28 U.S.C. §§ 2401(b) and 2675(a) to allow two "final denials" by a federal agency to occur at the same time, thereby nullifying § 2675(a)?

2. Is a claimant under the Federal Tort Claims Act entitled to equitable relief when a federal court unexpectedly decides a question of first impression in a manner that vitiates the express intent of Congress and statutory language on which the claimant had relied?

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Citations of Opinions and Orders

The opinion of the United States Court of Appeals for the Ninth Circuit in *Lehman v. United States*, 154 F.3d 1010 (9th Cir. 1998), is set forth in the Appendix *[App. 1a-15a]*, as are the three underlying unpublished orders of the United States District Court for the District of Arizona *[App. 16a-33a]*, and the unpublished order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* in this matter *[App. 34a]*.

Basis For Jurisdiction in This Court

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 2, 1998.

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc was entered on November 17, 1998. This petition for writ of certiorari has been filed within ninety (90) days of November 17, 1998. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

Rule 29.4(b) or (c) of this Court does not apply.

Statutes in Question

This case primarily involves the interpretation and harmonization of two federal statutes, 28 U.S.C. § 2401 and 28 U.S.C. § 2675, which are set out in full in the appendix *[App. 36a & 37a]*. The language at issue is as follows:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of **final denial of the claim** by the agency to which it was presented.

28 U.S.C. § 2401(b) (emphasis added).

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a **final denial of the claim** for purposes of this section.

28 U.S.C. § 2675(a) (emphasis added).

Statement of the Case

The federal district courts had jurisdiction in this matter pursuant to 28 U.S.C. § 1346(b)(1).

Petitioner Judy Lehman was injured on February 6, 1993, in a motor vehicle collision involving a United States Postal Service employee. Petitioners presented their claim to the Postal Service, waited over six months without the federal agency acting on the claim, and ultimately proceeded with a lawsuit under 28 U.S.C. § 2675(a) because the agency's inaction constituted a final denial of the claim.

While Petitioners' lawsuit was pending, the Postal Service issued a written denial of Petitioners' claim. Approximately two months later, counsel for both parties agreed that the pending lawsuit would be voluntarily dismissed without prejudice until Ms. Lehman's medical condition stabilized, at which point settlement negotiations with the Postal Service would resume.

When Ms. Lehman's medical condition had stabilized, however, the Postal Service refused to negotiate, and Petitioners filed a second lawsuit on February 3, 1995. Respondent moved to dismiss the second action as untimely, and the district court granted that motion. Petitioners' motions to vacate the judgment, pursuant to Fed. R. Civ. P. 59(e), and to reinstate the original lawsuit, pursuant to Fed. R. Civ. P. 60(b)(6), were both denied.

The Ninth Circuit Court of Appeals affirmed the district court's rulings in an opinion authored by the Honorable Susan P. Graber. In this case of first impression, the Ninth Circuit determined that 28 U.S.C. § 2401(b) and § 2675(a) were functionally distinct, and permitted two final denials of one claim by a federal agency to exist at the same time. *[App. 2a & 4a-9a]*. Despite the circumstances of this case, the Ninth Circuit also ruled that Petitioners lacked sufficient evidence to justify equitable tolling, equitable estoppel, or Rule 60(b)(6) relief.

Argument in Support of Petition for Granting Writ

I. The Ninth Circuit Violated Congressional Intent and Established Canons of Statutory Construction By Declaring That Two "Final" Denials by a Federal Agency Can Exist at the Same Time

Federal Tort Claims Act lawsuits are brought by thousands of persons each year because they do not receive compensation from the federal agency responsible for their personal injuries. The Ninth Circuit's decision in this case may cause a dramatic increase in the number of such filings because the Ninth Circuit has declared that a lawsuit brought under 28 U.S.C. § 2675(a) has *no effect* on the six-month statute of limitations found in 28 U.S.C. § 2401(b), *[see App. at 8a]*. The Ninth Circuit thus has misconstrued the Federal Tort Claims Act in such a way as to give federal agencies the power to retroactively invalidate any lawsuit brought under § 2675(a).

Congress enacted the Federal Tort Claims Act to allow private citizens to obtain compensation for injuries caused by federal employees. In construing this waiver of sovereign immunity, this Court has said:

> [W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended.

United States v. Kubrick, 444 U.S. 111, 117-18 (1979) (citations omitted). The Ninth Circuit's published opinion in this case narrows the waiver of immunity that Congress intended, and renders § 2675(a) meaningless.

Both § 2401(b) and § 2675(a) require a tort victim to present a claim to the proper federal agency. In addition to this "presentment" requirement, both statutes recognize that the agency's "final denial of the claim"[1] is an important event. Under § 2675(a), a claimant *may not commence* an action against the United States *until* there has been a final denial by the federal agency, whether that final denial occurs through the agency's action or inaction. Under § 2401(b), a claimant *must commence* an action within six months *after* the federal agency mails a notice of final denial.

The primary issue in this case arises from the fact that § 2401(b) deals with one type of "final denial" — the "final denial" that occurs when the federal agency affirmatively acts by mailing a notice to the claimant. Section 2675(a), on the other hand, provides that a "final denial of the claim" can occur both through agency action *and inaction*. *See also, e.g.*, S. Rep. No. 1327, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 2515, 2518 *[excerpted in App. at 44a]* ("[I]f the agency fails to act in 6 months, the claimant may at his option elect to regard the inaction as a final denial and proceed to file suit."). The issue presented here — which the Ninth Circuit recognized was a question of first impression, *[App. at 2a]* — is whether there can be two "final denials" at the same time.

The Ninth Circuit answered that question in the affirmative, not only declaring that two "final denials" can

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[1] The "final denial of the claim" language was added to both statutes at the same time, in the same bill, when Congress amended the Federal Tort Claims Act in 1966. *See* H.R. Rep. No. 1532, 89th Cong., 2d Sess., at 17-19 (1966) *[excerpted in App. at 54a-55a]*.

exist simultaneously, but that the *second* "final denial" triggers the six-month statute of limitations of § 2401(b). *[App. at 2a.] But cf. Hannon v. United States Postal Serv.*, 701 F. Supp. 386, 387 (E.D.N.Y. 1988) ("[W]e do not decide whether the filing of a complaint . . . terminated or merely temporarily suspended the obligation of the Postal Service to notify plaintiffs of the denial of their claims.").

In reaching this conclusion, the Ninth Circuit did not "read the statutes to give effect to each . . . while preserving their sense and purpose," *Watt v. Alaska*, 451 U.S. 259, 267 (1981), but declared that "the wording of sections 2401(b) and 2675(a) suggests that they are functionally distinct" because "Section 2675(a) expressly states that a claim may be deemed denied only 'for purposes of this section.'" *[App. at 8a]*. Read in the full context of the statute, however, the provision that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall . . . be deemed a final denial of the claim for purposes of this section" simply declares that a § 2675(a) final denial caused by agency inaction is a "final denial" for purposes of the statute's exhaustion requirement — both § 2401(b) and the first sentence of § 2675(a) refer to a denial sent by certified or registered mail. The Ninth Circuit has rendered § 2675(a) meaningless by rewriting the statute to say that an agency's inaction is a final denial "*only* 'for purposes of this section'" (emphasis added).

Under the Ninth's Circuit's interpretation of the Federal Tort Claims Act, the "final denial" defined by the second sentence of § 2675(a) is not "final" at all, at least not under the usual meaning of the word:

fi-nal . . . **1.** of or coming at the end; last;

> concluding **2.** deciding; conclusive *[a final decree]* **3.** having to do with the ultimate purpose or end *[a final cause]* . . . .

Webster's New World Dictionary 281 (1977). Rather, the Ninth Circuit permits a federal agency to ignore the fact that the agency's inaction constitutes a final denial under § 2675(a) by declaring that the federal agency may issue a valid second "final denial" under § 2401(b). But logic, semantics, and even common sense dictate that only one *final* denial can exist at a time.

The Ninth Circuit's construction of federal law creates problems that extend beyond its judicial repeal of the second sentence of § 2675(a). Section 2401(b) declares that

> [a] tort claim against the United States shall be forever barred . . . unless action is begun within six months **after** the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(Emphasis added.) The Ninth Circuit's decision permits a federal agency to trigger that six-month limitation period by mailing a denial letter *after* the claimant has commenced an action under § 2675(a). Because the claimant's pending § 2675(a) lawsuit was not "begun within six months *after*" the agency mailed its denial letter, the claimant must file a *second* action or the tort claim will be forever barred. The Ninth Circuit thus has authorized federal agencies to commence a roving statute of limitations *after* a claimant has filed an action pursuant to § 2675(a).

The Senate and House Reports accompanying the 1966 amendments to the Federal Tort Claims Act establish that

Congress struck a balance between the increased settlement authority given to federal agencies and the claimant's right to seek relief in the federal courts:

> The procedure provided in the bill would require a claimant to file his claim with the agency within 2 years after the claim accrues. The agency will then have 6 months to consider the claim prior to granting or denying it. . . . [I]f the agency fails to act in 6 months, the claimant may at his option elect to regard this inaction as a final denial and proceed to file suit.

S. Rep. No. 1327, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 2517, 2518 *[excerpted in App. at 44a]*; H.R. Rep. No. 1532, 89th Cong., 2d Sess., at 8 (1966) *[excerpted in App. at 53a]*. The Ninth Circuit's decision in this case destroys that balance.

Congress amended the Federal Tort Claims Act in 1966 to provide for "more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government," *Anderson v. United States*, 803 F.2d 1520, 1522-23 (9th Cir. 1986); S. Rep. No. 1327, *supra*, at 2515-16 *[App. at 39a]*; H.R. Rep. No. 1532, *supra*, at 5 *[App. at 51a]*. The Ninth Circuit has thwarted that congressional intent, disregarded established canons of statutory construction, upset the balance that Congress created between federal agencies and claimants, and grievously erred in deciding an important question of federal law by declaring that a federal agency has the power to trigger the § 2401(b) limitation period while a § 2675(a) lawsuit is pending.

II. Equitable Relief Is Appropriate When a Court Disregards Its Own Cases, Decisions from Other Federal Courts (Including the United States Supreme Court), and the Intent of Congress in Deciding a Question of First Impression

Established canons of statutory construction require courts to fulfill the intent of Congress and avoid absurd results by construing related statutes together, giving effect to the language of both statutes, and harmonizing them to the greatest extent possible. *See, e.g., Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846-48 (1997); *F.D.I.C. v. Meyer*, 510 U.S. 471, 479 (1994); *Molzof v. United States*, 502 U.S. 301, 306 (1992); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *accord, e.g., Anderson v. United States*, 803 F.2d 1520, 1523 (9th Cir. 1986). The Ninth Circuit's decision in this case does not consider the intent of Congress, nor does the decision attempt to harmonize or give effect to both 28 U.S.C. § 2675(a) and 28 U.S.C. § 2401(b); the decision simply permits federal agencies to ignore § 2675(a) entirely. The Ninth Circuit then utilized its decision on this question of first impression as the dispositive factor in rejecting Petitioners' requests for relief based on equitable tolling, equitable estoppel, and Rule 60(b)(6) of the Federal Rules of Civil Procedure. *See App. at 12a-15a*; *cf., e.g., Schmidt v. United States*, 498 U.S. 1077 (1991); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

The absence of clear precedent on an issue is a factor that a court should consider in deciding whether to grant equitable relief. *See Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862 (9th Cir. 1996); *Dempsey v. Pacific Bell Co.*, 789 F.2d 1451, 1453 (9th Cir. 1986); *Vance v.*

Whirlpool Corp., 707 F.2d 483, 490 (4th Cir. 1983), *supplemented on reh'g*, 716 F.2d 1010 (4th Cir. 1983), *cert. denied*, 465 U.S. 1102 & 467 U.S. 1226 (1984). According to the Ninth Circuit's decision in this case, however, Petitioners' counsel somehow should have known that the Ninth Circuit would ignore the Congressional intent behind the 1966 amendments to the Federal Tort Claims Act and would refuse to harmonize § 2401(b) and § 2675(a) in accordance with the suggestion in *Hannon v. United States Postal Service* — that the filing of a complaint might temporarily suspend the agency's ability to trigger the § 2401(b) six-month limitation period, *see* 701 F. Supp. 386, 387 (E.D.N.Y. 1988) — even though the *Hannon* opinion was approved and followed by the Ninth Circuit in *Parker v. United States*, 935 F.2d 176, 177 (9th Cir. 1991); *see also Pascale v. United States*, 998 F.2d 186, 190-92 (3d Cir. 1993) (quoting and following *Hannon* and *Parker*).[2] Without ever seeing the Postal Service's letter itself, the Ninth Circuit assumed that it sufficed to put Petitioners on notice that the § 2401(b) limitation period had begun to run even though Petitioners' § 2675(a) lawsuit was pending in federal court at the time. Respondent presented no evidence to establish prejudice or to deny that Petitioners' original lawsuit had been dismissed based upon an agreement between counsel for the parties. *Cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or

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[2] *Hannon*, *Parker*, and *Pascale* held that the filing of a § 2675(a) lawsuit did not trigger the six-month limitations period of § 2401(b), thus allowing the claimant to file a second action after the first lawsuit had been dismissed without prejudice. *See Pascale*, 998 F.2d at 193; *Parker*, 935 F.2d at 177-78; *Hannon*, 701 F. Supp. at 388-90.

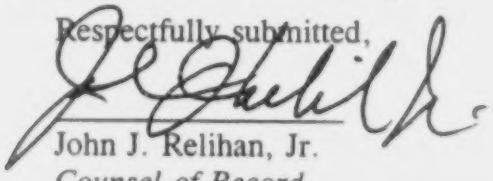
circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995) ("[W]e must reverse if the factual and legal issues are not sufficiently clear to permit us to determine with certainty whether the doctrine could be successfully invoked."); *accord F.D.I.C. v. Dawson*, 4 F.3d 1303, 1308 (5th Cir. 1993), *cert. denied*, 512 U.S. 1205 (1994). Whether or not the Supreme Court agrees with the Ninth Circuit's construction of § 2401(b) and § 2675(a), the Ninth Circuit's perfunctory rejection of Petitioners' requests for equitable relief conflicts with relevant decisions of the Supreme Court, other Circuits, and the Ninth Circuit itself.

Conclusion

The Ninth Circuit incorrectly decided an important question of federal law that will affect thousands of litigants. This issue of first impression should be settled by the nation's highest Court in accordance with recognized and established canons of statutory construction. The exercise of the Court's supervisory power is appropriate to rectify the Ninth Circuit's departure from the accepted and usual course of judicial proceedings regarding the interpretation of federal statutes and application of statutes of limitation, particularly when the lower court's action nullifies a federal statute and thwarts the express intent of Congress.

Petitioners therefore respectfully request the Supreme Court of the United States for a writ of certiorari to issue for the review the opinion of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate the judgment and remand the cause to the District Court to allow Petitioners to proceed with their claim for damages.

Respectfully submitted,



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDY LEHMAN, wife; MARK LEHMAN, husband, *Plaintiffs-Appellants*, v. UNITED STATES OF AMERICA, *Defendant-Appellee*.	No. 97-15695 D.C. No. CV 95-00216-SMM

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

JUDY LEHMAN, wife; MARK LEHMAN, husband, *Plaintiffs-Appellants*, v. UNITED STATES OF AMERICA, *Defendant-Appellee*.	No. 97-16454 D.C. No. CV 94-00083-EHC OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
August 14, 1998—San Francisco, California

Filed September 2, 1998

Before: Melvin Brunetti, A. Wallace Tashima, and
Susan P. Graber, Circuit Judges.

Opinion by Judge Graber

COUNSEL

Frank M. Sandler, Solomon, Relihan & Blake, Phoenix, Arizona, for the plaintiffs-appellants.

Richard G. Patrick, Assistant United States Attorney, Phoenix, Arizona, for the defendant-appellee.

OPINION

GRABER, Circuit Judge:

This case involves issues of first impression for the Ninth Circuit regarding the interplay between two provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2401(b) and 2675(a).[1] We hold that (1) a claimant's filing of an action pursuant to section 2675(a), before an agency issues a written notice of final denial, does not preclude the agency from later issuing a written notice of final denial, and (2) the six-month statute of limitations provided by section 2401(b) begins to run on the date when the agency mails that written notice by certified or registered mail. We further hold that, in the circumstances of this case, (1) plaintiffs are not entitled to relief from the voluntary dismissal of their first, timely action, and (2) plaintiffs' second action was time-barred. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Judy Lehman and Mark Lehman are wife and husband. On February 6, 1993, Judy Lehman was struck and injured by a United States Postal Service vehicle driven by Postal Service employee Ted Dailey. Less than four months later, on May 28, 1993, plaintiffs timely filed an administrative claim with the Postal Service, pursuant to the FTCA. The Postal Service finally denied the claim on January 21, 1994, by mailing a written notice in the requisite manner.

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[1]The text of these provisions appears at pp. 10111-12, below.

On July 16, 1993, before receiving the Postal Service's notice of final denial, plaintiffs filed an action against Dailey, as an individual, in Arizona state court (*Lehman I*). *See Staple v. United States*, 740 F.2d 766, 768 (9th Cir. 1984) ("We do not believe that the filing of [a state court] action, during the period which section 2401(b) gives plaintiff to pursue her administrative remedy, violates section 2675."). Plaintiffs did not, however, serve the summons and complaint until December 29, 1993, more than six months after they filed the administrative claim. On January 11, 1994, the United States removed plaintiffs' action to federal court and substituted itself as the sole defendant. As noted, the Postal Service mailed its notice of final denial on January 21, 1994, nearly nine months after receiving plaintiffs' administrative claim.

On March 9, 1994, plaintiffs voluntarily dismissed *Lehman I* without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1).[2] Plaintiffs assert that they dismissed that action in reliance on an agreement with opposing counsel that the action "would be voluntarily dismissed until Ms. Lehman's medical condition had stabilized, at which point settlement negotiations" would resume. Plaintiffs further assert that defendant's new counsel repudiated the agreement and refused to settle plaintiffs' claim. Plaintiffs filed a new FTCA action, *Lehman II*, on February 3, 1995, more than a year after the Postal Service had mailed its notice of final denial.

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[2]Fed. R. Civ. P. 41(a)(1) provides in part:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer . . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . . .

The United States moved to dismiss *Lehman II*, pursuant to Fed. R. Civ. P. 12(b)(6).[3] The district court dismissed *Lehman II* as time-barred, on the ground that plaintiffs had failed to bring that action within six months after the date of mailing of the Postal Service's notice of final denial, 28 U.S.C. § 2401(b). The district court later denied plaintiffs' motion for reconsideration.

While the motion for reconsideration was pending, plaintiffs also moved, pursuant to Fed. R. Civ. P. 60(b)(6),[4] to vacate their voluntary dismissal of *Lehman I*. They argued that defense counsel's repudiation of the agreement constituted an exceptional circumstance warranting such relief. The district court denied plaintiffs' motion.

Plaintiffs appeal, challenging the district court's dismissal of *Lehman II* and its refusal to reinstate *Lehman I*.

STATUTE OF LIMITATIONS APPLICABLE TO *LEHMAN II*

We review *de novo* a district court's interpretation of a statute. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1315 (9th Cir. 1998). The statutes that we interpret here are 28 U.S.C. §§ 2401(b) and 2675(a).

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[3]Fed. R. Civ. P. 12(b)(6) provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted[.]

[4]The text of that rule appears at p. 10120, below.

[1] Title 28 U.S.C. § 2401(b)[5] contains two provisions pertaining to the timing of FTCA litigation. The first requires that any tort claim against the United States be "presented in writing to the appropriate Federal agency within two years after such claim accrues." Plaintiffs satisfied that requirement by filing their administrative claim with the Postal Service on May 28, 1993, less than four months after the accident. The second provision requires that any tort action be brought "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." Taken together, those statutes are statutes of limitation that address the question: Was the claimant's FTCA action brought *too late*?

[2] Title 28 U.S.C. § 2675(a),[6] on the other hand, addresses a different question: Was the claimant's FTCA action brought *too early*? That section prohibits a claimant

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[5]28 U.S.C. § 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

[6]28 U.S.C. § 2675(a) provides in part:

> An action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. . . .

from bringing an FTCA action "unless the claimant shall have *first* presented the claim to the appropriate Federal agency *and* his claim shall have been *finally denied* by the agency in writing and sent by certified or registered mail." (Emphasis added.) A claimant need not, however, await an agency's response indefinitely. Section 2675(a) further provides that, if the agency fails "to make final disposition of a claim within six months after it is filed," the claimant may, at any time thereafter, deem the agency's silence to be "a final denial of the claim *for purposes of this section*." (Emphasis added.) Thus, if an agency fails to issue a notice of final denial within six months of receiving an administrative claim, "the claimant may either deem it denied and file suit in district court at any time prior to final agency action or the claimant may await final agency action and file suit within six months thereafter." *Anderson v. United States*, 803 F.2d 1520, 1522 (9th Cir. 1986).

Plaintiffs in this case properly invoked section 2675(a) to perfect the timeliness of *Lehman I*. They presented their administrative claim to the Postal Service in a timely manner but did not receive the agency's notice of final denial within six months thereafter. Accordingly, plaintiffs deemed their claim denied under section 2675(a) and filed and served their complaint in *Lehman I*. The United States does not dispute the timeliness of *Lehman I*.

What it does contest, however, is the timeliness of *Lehman II*. The United States contends that, once the Postal Service properly mailed the notice of final denial, the six-month limitations period of 28 U.S.C. § 2401(b) started to run, even though more than six months had passed since the filing of the administrative claim and even though plaintiffs had filed *Lehman I* in a timely manner. Because plaintiffs brought *Lehman II* after the six-month statute of limitations had expired, the United States reasons, *Lehman II* was time-barred.

[3] As with any case of statutory interpretation, we must begin with the words of the statute. *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1297 (9th Cir. 1998). In this instance, the words are plain: "*A tort claim* against the United States *shall be forever barred . . . unless action is begun within six months after the date of mailing*, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b) (emphasis added). As this court has explained, the six-month "limitations period applies only when the agency has made a final disposition of the claim and notified the claimant by mail. The six[-]month period does not begin to run until the agency has notified the claimant of a final denial in accordance with section 2401(b)." *Parker v. United States*, 935 F.2d 176, 177 (9th Cir. 1991).

[4] Here, the Postal Service mailed its notice of final denial to plaintiffs on January 21, 1994, in the requisite manner. The six-month limitations period began to run then. Plaintiffs did not file *Lehman II* until February 3, 1995, well beyond the six months. *Lehman II* was, therefore, time-barred.

Plaintiffs argue that their invocation of the "deemed denial" option under section 2675(a) and their timely filing of *Lehman I* suspended — either permanently or temporarily — the Postal Service's authority to issue a written notice of final denial and thus to trigger the statute of limitations. They reason that, because both sections 2401(b) and 2675(a) use the same phrase, "final denial of the claim," to signal when a claimant may file an action, there can be but one "final denial of a claim." Because the Postal Service's "final denial of a claim" came second, plaintiffs contend that it was a legal "nullity," which could not have triggered the six-month statute of limitations. At most, plaintiffs argue, the limitations period could have been triggered for *Lehman II* only if the Postal Service had issued its notice of final

denial *after* plaintiffs had voluntarily dismissed *Lehman I*.

[5] The plain words of the FTCA preclude plaintiffs' interpretation. Neither section 2401(b) nor section 2675(a) nor any other provision of the FTCA contains anything to suggest that an agency's authority to issue a notice of final denial is terminated, or even temporarily suspended, when a claimant brings an action that is timely under section 2675(a). To the contrary, the wording of sections 2401(b) and 2675(a) suggests that they are functionally distinct. Section 2675(a) expressly states that a claim may be deemed denied only "for purposes of this section." Thus, a "deemed" final denial under section 2675(a) has no effect beyond what is stated in *that* section. This court implicitly reached the same conclusion in *Parker*, when we held that a "deemed" denial under section 2675(a) does not trigger the six-month statute of limitations in section 2401(b). *Parker*, 935 F.2d at 177-78. Similarly, a "deemed" denial does not limit whether or when a federal agency may issue a written notice of final denial, which triggers the limitations period in section 2401(b).

[6] Further, our reading of the statutes finds contextual support. Triggering the statute of limitations by an *actual* denial after a claim has been "deemed" denied serves an important function: It provides an agency with *certainty* that it will not be subject to an action to establish liability after a definite date. That function is particularly important under the FTCA, because the statute contains *no time limit* for commencing an action when an administrative claim has been deemed denied under section 2675(a), in the absence of an actual denial. *See* 28 U.S.C. § 2675(a) (providing that the claimant may deem silence to be a denial "any time" after the expiration of six months from the presentation of the claim); *McCallister v. United States*, 925 F.2d 841, 843-44 (5th Cir. 1991) (per curiam) (holding that the FTCA contains no time limit for commencing an action under the

"deemed denied " provision); *Taumby v. United States*, 919 F.2d 69, 70 (8th Cir. 1990) (same); *Conn v. United States*, 867 F.2d 916, 919-21 (6th Cir. 1989) (same); *but see Miller v. United States*, 741 F.2d 148, 150 (7th Cir. 1984) (holding that an action must be filed within a "reasonable time" after the six-month review period expires). Unless an agency can issue its notice of final denial and trigger the statute of limitations even after an action is filed, a claimant theoretically could file an action, voluntarily dismiss it, and then re-file years later, when the incident has faded from witnesses' memories. Only by issuing a formal denial, whether within the six-month review period or not, can an agency protect itself "from any prejudice due to the staleness of the claim and the attendant loss of evidence." *Hannon v. United States Postal Serv.*, 701 F. Supp. 386, 389 n.7 (E.D.N.Y. 1988) (cited with approval in *Parker*, 935 F.2d at 177).

In summary, neither the passage of six months from the presentation of a tort claim to an agency nor the claimant's filing of an action under the "deemed denied" provision of 28 U.S.C. § 2675(a) terminates or suspends the agency's authority to issue a written notice of final denial of the claim. When an agency properly mails a notice of final denial, the six-month statute of limitations, 28 U.S.C. § 2401(b), begins to run. In the present case, plaintiffs filed *Lehman II* more than six months after the Postal Service properly mailed its notice of final denial. That being so, *Lehman II* is time-barred.

EQUITABLE TOLLING AND EQUITABLE ESTOPPEL

Plaintiffs next argue that the district court erred in dismissing *Lehman II* as time-barred even if their argument as to the meaning of the statutes fails. They assert that the six-month statute of limitations was equitably tolled and that the government was equitably estopped from raising a

defense based on the statute of limitations. We review *de novo* the dismissal of an action based on the statute of limitations. *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993).

Plaintiffs' evidence in support of both equitable doctrines consists of an affidavit from plaintiffs' counsel, which states in material part:

> 2. On or about March 9, 1994, two days before Defendant's answer was due in [*Lehman I*], I had a telephone conversation with defense counsel regarding the prosecution of that action.
>
> 3. As part of that conversation, defense counsel and I discussed the possibility that the case could settle if time was allowed for Judy Lehman's medical condition to stabilize and her medical prognosis to be developed. Defense counsel expressed some confidence that the Postal Service would be interested in trying to settle rather than engage in the expense of litigation.
>
> 4. As part of that conversation, defense counsel and I discussed the possibility of dismissing [*Lehman I*] until Ms. Lehman's medical condition had stabilized to the point where settlement negotiations would be productive.
>
> 5. Based on our conversation, defense counsel and I agreed that the action would be voluntarily dismissed until Ms. Lehman's medical condition had stabilized, at which point settlement negotiations with the Postal Service would resume.
>
> 6. Although I knew that the lawsuit would need to be re-filed within two years of the February 6, 1993, collision, *at no point in our conversation did*

> *defense counsel advise me* that Plaintiffs' action would need to be re-filed by July 28, 1994.
>
> 7. *Had defense counsel informed me* that Plaintiffs' action would need to be re-filed by July 28, 1994, I would not have agreed to a voluntarily [sic] dismissal, because it would have made no sense to dismiss the suit and incur the additional costs of filing and serving a second complaint just to gain a five-month postponement. Instead, I would have agreed to not present any opposition if Defendant asked the Court for a second extension of time to answer the complaint.

(Emphasis added.) That evidence is insufficient to establish either equitable tolling or equitable estoppel.

A. *Equitable Tolling*

[7] Equitable tolling focuses primarily on *the plaintiff's* excusable ignorance of the limitations period. *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995). This court has explained that the doctrine is not available to avoid the consequences of one's own negligence:

> The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire, and when the [agency's written] notice of the statutory period was clearly inadequate. *Courts have been generally unforgiving, however, when a late filing is due to claimant's failure "to exercise due diligence in preserving his legal rights."*

Scholar v. Pacific Bell, 963 F.2d 264, 267-68 (9th Cir.

1992) (citations omitted) (emphasis added).

[8] Nothing in counsel's affidavit demonstrates that plaintiffs' ignorance of the limitations period was excusable. The affidavit avers that the government's lawyer *failed to explain* to plaintiffs' counsel the consequences of a voluntary dismissal in the face of a written notice of final denial. The affidavit does *not* state that the government's lawyer gave affirmatively misleading (or, indeed, any) advice about the statute of limitations. In *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1049 (9th Cir. 1987), the plaintiff argued that the statute of limitations should have been equitably modified, because the defendant had not informed her of the applicable statute of limitations. This court held that equitable relief was not available, because the opposing party had no duty to inform the plaintiff of the statute of limitations. *Id.* at 1050. *See also Williams v. United States*, 711 F.2d 893, 899 (9th Cir. 1983) (stating that it is a claimant's responsibility to follow strictly the procedural requirements of the FTCA and that a federal agency has no duty to tell a claimant that an action might not lie against the agency under the FTCA). Similarly, in this case, the absence of legal advice from the government's counsel does not make plaintiffs' ignorance of the limitations period excusable.

[9] Further, the affidavit does not state that the government prevented plaintiffs from re-filing the action, for example, by creating impossible timing. *Compare Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (stating a general rule that equitable tolling applies when the defendant's wrongful conduct prevents the plaintiffs from asserting their claim or when it is impossible for the plaintiffs to file on time due to extraordinary circumstances beyond their control), *cert. denied*, 118 S. Ct. 60 (1997). Neither does the affidavit state that the government's lawyer gave any assurance that the statute of

limitations would be tolled or that the government would forego a statute of limitations defense. The mere expression of "some confidence" that the agency "would be interested in trying to settle" the case later is not enough to excuse plaintiffs' letting the statute of limitations lapse. In these circumstances, equitable tolling does not apply.

B. *Equitable Estoppel*

[10] Equitable estoppel focuses on the actions of *the defendant*. *Supermail Cargo*, 68 F.3d at 1207. The elements of equitable estoppel are that

> (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct. When a party seeks to invoke equitable estoppel against the government, we additionally require a showing that the agency engaged in "affirmative conduct going beyond mere negligence" and that "the public's interest will not suffer undue damage" as a result of the application of this doctrine.

United States v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995) (citations omitted).

[11] Here, at a minimum, plaintiffs fail to meet the third element. They were not ignorant of the relevant facts. The notice of final denial that the Postal Service mailed to them contained written advice of the six-month period of limitation. Moreover, 28 U.S.C. § 2401(b) provided then, as now, that an action is "forever barred" if not filed within six months of the requisite mailing of an agency's denial of a claim.

[12] Additionally, an omission to give advice is insufficient conduct to support equitable estoppel against the government. *See Cadwalder v. United States*, 45 F.3d 297, 299-300 (9th Cir. 1995) (holding that inaction, in the form of the government's failure to inform the plaintiffs that their claim was legally insufficient, could not support equitable estoppel). Plaintiffs cannot successfully invoke equitable estoppel here.

C. *Conclusion*

[13] We conclude that the district court did not err when it dismissed *Lehman II* as time-barred.

MOTION TO VACATE VOLUNTARY DISMISSAL OF *LEHMAN I*

Plaintiffs' final argument is that the district court erred when it denied their motion, made pursuant to Fed. R. Civ. P. 60(b)(6),[7] to vacate the voluntary dismissal of *Lehman I*. We review a district court's denial of a Rule 60(b) motion to vacate a dismissal for abuse of discretion. *United States v. 87 Skyline Terrace*, 26 F.3d 923, 929 (9th Cir. 1994).

[14] Rule 60(b)(6) is a catch-all provision that allows a court to vacate a judgment for "any other reason justifying relief from the operation of the judgment." That rule "has been used sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). To receive Rule 60(b)(6) relief, a moving party must "show both injury and that circumstances beyond its control

---

[7]Fed. R. Civ. P. 60(b)(6) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

prevented timely action to protect its interests." *Id.* Neglect or lack of diligence is not to be remedied through Rule 60(b)(6). *United States v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994); *Stevens v. ITT Sys., Inc.*, 868 F.2d 1040, 1041 (9th Cir. 1989). In this case, the district court denied plaintiffs' Rule 60(b)(6) motion on the ground that there was no evidence that counsel for the parties had entered into a formal written or oral agreement that, if *Lehman I* were dismissed, plaintiffs could refile at any time in the future without regard to the statute of limitations.

[15] Plaintiffs argue that Rule 60(b)(6) relief is justified, because defense counsel repudiated an agreement that settlement negotiations would resume when Ms. Lehman's medical condition stabilized, if plaintiffs agreed to dismiss *Lehman I*. *See Kalt v. Hunter*, 66 F.3d 1002, 1006 (9th Cir. 1995) (noting that, although Rule 60(b)(6) may not be used to enforce a settlement agreement, it may be used to reopen a dismissed case because of breach of a settlement agreement); *Keeling v. Sheet Metal Workers Int'l Ass'n*, 937 F.2d 408, 410 (9th Cir. 1991) ("Repudiation of a settlement agreement that terminated litigation pending before a court constitutes an extraordinary circumstance, and it justifies vacating the court's prior dismissal order."). The United States counters that the agreement incorporated no promises with respect to the tolling of the statute of limitations, with respect to the conditions of any future litigation, or even with respect to the certainty of reaching a settlement on the merits. As discussed in the foregoing section, on this record, the government's characterization of the agreement is correct. The district court did not abuse its discretion.

The judgment in each of these cases is AFFIRMED.

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CLERK OF U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY /s/J- DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JUDY LEHMAN, and MARK LEHMAN,	)	
Plaintiffs,	)	CIV 95-00216-PHX-SMM
v.	)	**MEMORANDUM OF DECISION AND ORDER**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

I. PROCEDURAL BACKGROUND

On February 6, 1993, Plaintiffs were involved in an automobile accident with a Postal Service vehicle driven by Ted Dailey. On May 28, 1993, Plaintiffs filed an administrative claim, pursuant to the federal Tort Claims Act, 28 U.S.C. § 2671 et seq, with the United States Postal Service.

On July 16, 1993, prior to any decision on the administrative claims by the Postal Service, Plaintiffs filed suit in state court against Ted Dailey, the Postal Service employee. On January 11, 1994, the lawsuit was removed to United States District Court (CIV-94-0083-PHX-EHC) ("Lehman I"), and the United States was substituted as

Defendant. On March 9, 1994, Plaintiffs filed a Notice of Dismissal pursuant to Rule 41(a)(1), Fed.R.Civ.P. and the case was dismissed without prejudice.

The Postal Service denied the claim on January 28, 1994, and the Plaintiffs filed the present action on February 3, 1995 ("Lehman II"). The Plaintiffs served the United States on May 26, 1995.

Defendant originally filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The Court denied Defendant's motion with leave to refile under 12(b)(6). Pending before the court is Defendant's motion to dismiss pursuant to Rule 12(b)(6). Defendant again argues that Plaintiffs' suit is barred by the statute of limitations, 28 U.S.C. § 2401(b), because Plaintiffs failed to file the instant suit within six months of Defendant's denial of Plaintiffs' administrative claim on January 21, 1994. The motion is fully briefed and the Court heard oral argument on February 3, 1997.

II. STANDARD OF REVIEW

A court should not dismiss a complaint unless convinced beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitled the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Lewis v. Telephone Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996); Parks Sch. of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996); National Wildlife Fed'n v. Espy, 45 F.3d 1337, 1340 (9th Cir. 1995). On a motion to dismiss, the Court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992).

In deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must presume all factual allegations of the complaint to be true. Miree v. DeKalb County, Georgia, 433 U.S. 25, 27 n.2 (1977); NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Conclusory allegations of law and unwarranted inferences, however, are insufficient to defeat a motion to dismiss. In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996).

If matters outside the pleadings are submitted, the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is treated as one for summary judgment. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996); Lucas v. Department of Corrections, 66 F.3d 245, 248 (9th Cir. 1995); Jacobson v. AEG Capitol Corp., 50 F.3d 1493, 1496 (9th Cir. 1995). However, a Court is expressly permitted to "exclude[]" extraneous materials submitted by a party concerning a 12(b)(6) motion to dismiss. Fed. R. Civ. P. 12(b); see also, e.g., North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 582 (9th Cir. 1983); 2A Moore's Fed. Pract. ¶ 12.09[3], at 12-107 (2d ed. 1993).

Plaintiffs submitted a letter from Plaintiffs' lawfirm and an affidavit by Plaintiffs' counsel. The issue presented in this case poses one of pure law to which the materials submitted by Plaintiffs outside the pleadings have no bearing. The documents attached to Plaintiffs' response shall therefore be disregarded pursuant to the authority granted this Court by operation of Rule 12(b).

III. DISCUSSION

The doctrine of equitable tolling provides that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . . ." Holmberg v. Armbrecht, 327

U.S. 392, 397, 66 S.Ct. 582 (1946) (internal quotations omitted). Equitable tolling is appropriate when plaintiffs are prevented from asserting their claims because of wrongful conduct by the defendant, or where extraordinary circumstances beyond plaintiffs' control made it impossible to timely file the claims. Alvarez-Machain v. Unite States, 96 F.3d 1246, 1251 (9th Cir. 1996) (citation omitted).

Plaintiffs filed an administrative claim with the Postal Office on May 28, 1993. On January 11, 1994, before exhausting their administrative claim, Plaintiffs removed Lehman I to federal court. As such, Lehman I was jurisdictionally deficient when Plaintiffs removed it to federal court. Moreover, Plaintiffs voluntarily dismissed Lehman I. For purposes of application of the statute of limitations, an action that was voluntarily dismissed by plaintiffs pursuant to Rule 41, Federal Rules of Civil Procedure, is as if the prior suit had never brought in the first place. Humphreys v. United States, 272 F.2d 411, 412 (9th Cir. 1959) ("a suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought in the first place"); see also, Wright & Miller, Federal Practice and Procedure: Civil § 2367. Lastly, Plaintiffs' argument that Defendant's counsel in Lehman I failed to advise Plaintiffs that they would need to refile their lawsuit by July 28, 1994 is equally unpersuasive. See, e.g., Williams v. United States, 711 F.2d 893, 899 (9th Cir. 1983).

Pursuant to 28 U.S.C. § 2401(b), Plaintiffs had six months, or until July 21, 1994, to timely institute the present action. Plaintiffs, however, waited until February 3, 1995 to file the present action. Accordingly, Plaintiffs failed to timely file the present lawsuit. The Court, therefore, has no jurisdiction to entertain this action. See Powers v. United States, 390 F.3d 602, 604 (9th cir. 1968) (citation omitted)

(if tort claim against United States not filed within time prescribed, federal district court has no jurisdiction to entertain it).

IV. CONCLUSION

For the foregoing reasons,

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (Doc. #13) is GRANTED.

IT IS FURTHER ORDERED that the Clerk of Court terminate this action accordingly.

DATED this 5 day of February, 1997.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

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DISTRICT OF ARIZONA
BY /s/J- DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JUDY LEHMAN, and MARK LEHMAN,	)	
Plaintiffs,	)	CIV 95-00216-PHX-SMM
v.	)	
	)	**ORDER**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

INTRODUCTION

Pending before the Court is Plaintiffs' motion for reconsideration and motion to vacate the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The Court granted Defendant's motion to dismiss and judgment was entered on February 6, 1997. Plaintiffs subsequently filed a notice of appeal on April 4, 1997.

STANDARD OF REVIEW

A district court may grant a motion to reconsider only in "highly unusual circumstances." See School Dist. No. 1J. Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). "Reconsideration is appropriate if the district court (1) is presented with newly discovered

evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Id. Thus, the Court may refuse to consider evidence that was available prior to the summary judgment. Hopkins v. Andaya, 958 F.2d 881, 887, n.5 (9th Cir. 1992). A motion for reconsideration should not be used to ask the court "to rethink what the court had already thought through -- rightly or wrongly". Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). Arguments that the court was in error on the issues it considered should be directed to the court of appeals. See Sullivan v. Faras-RLS Group, Ltd., 795 F.Supp. 305, 308 (D. Ariz. 1992).

Procedurally, motions to reconsider are generally treated as motions to alter or amend the judgment or a motion for relief from a judgment or order. See Fed. R. Civ. P. 59(e), 60 (1995). Thus, a court may grant a motion for reconsideration for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied; and (6) any other reason justifying relief from the operation of the judgment. Id. 60(b). Under the Local Rule, the Court may deny a motion for reconsideration without allowing the opposing party to respond. See Rules of Practice for the United States District Court, District of Arizona, 1.10(p) (1994). However, the Court must allow the opponent to respond before granting the motion. See id.

DISCUSSION

Plaintiffs argue the Lehman I, CIV-94-0083-PHX-EHC, was jurisdictionally sufficient as of the date, following removal to federal court, of the substitution of the United

States as defendant because by that date the six month time period for the Postal Service to consider their claim had run and they, in effect, deemed the claim denied pursuant to 28 U.S.C. § 2675(a). Plaintiffs further argue that because of their deemed denial of their administrative claim, the Postal Service's subsequent denial by letter, dated January 21, 1994, was a nullity.

As the Court noted in its Order, Plaintiffs voluntarily dismissed Lehman I. For purposes of application of the statute of limitations, an action that was voluntarily dismissed by plaintiffs pursuant to Rule 41, Federal Rules of Civil Procedure, is as if the prior suit had never brought in the first place. Humphreys v. United States, 272 F.2d 411, 312 (9th Cir. 1959) (after widow voluntarily dismissed without prejudice, a Federal Tort Claims Act suit was brought on account of husband's death, and widow was denied reinstatement because statute of limitations had, by then, run); see also, Wright & Miller, *Federal Practice and Procedure,* § 2367. Accordingly, whether subject matter jurisdiction existed in Lehman I is irrelevant to the statute of limitations issue in the present action.

The six month requirement does not begin to run until the agency has notified the claimant of a final denial in accordance with § 2401(b). Parker v. United States, 935 F.2d 176, 177 (9th Cir. 1991). Plaintiffs filed an administrative claim with the Postal Service in May 1993. The Postal Service issued its claim denial letter in January 1994. Plaintiffs filed the present action in February 1995. Accordingly, as the Court held, the present action is barred by the statute of limitations. See Powers v. United States, 390 F.3d 602, 604 (9th Cir. 1968) (citation omitted) (if tort claim against the Untied States not filed within time prescribed, federal district court has no jurisdiction to entertain it).

Furthermore, for the reasons set forth below, Plaintiffs' argument that Defendant's counsel in Lehman I failed to advise Plaintiffs that they would need to refile their lawsuit by July 28, 1994 is as equally unpersuasive as Plaintiffs' argument that the Court incorrectly disregarded the affidavit from H. Michael Wright and a letter to the Claims Department of the United States Postal Office submitted in support of Plaintiffs' response to Defendant's motion to dismiss.

Settlement negotiations do not give rise to the doctrine of equitable tolling. Ferreiro v. United States, 934 F.Supp. 1375 (S.D. Fla. 1996). In Ferreiro, the plaintiff argued that the statute of limitations was equitably tolled during settlement negotiations because the government attorney handling the case provided the plaintiff with inaccurate information regarding the proper procedure for pursuing his claim. Id. at 1377. Citing Irwin v. Veterans Affairs, 498 U.S. 89, 95-96, 111 S.Ct. 453, 458 (1990), the court noted that equitable tolling is inapplicable to "late filings where the claimant failed to exercise due diligence in preserving his legal rights" or for "what is at best a garden variety claim of excusable neglect." Id. (citing Irwin, 498 U.S. at 96, 111 S.Ct. at 458). The Ferreiro court also noted that courts consistently have refused to apply the doctrine of equitable tolling "where an adversary's misrepresentation caused a plaintiff to allow a filing period to lapse." Id. at 1378 (citing Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 79 S.Ct. 760 (1959); Holmberg v. Armbrecht, 327 U.S. 392 (1946); First Alabama Bank, N.A. v. United States, 981 F.2d 1226 (11th Cir. 1993)).

The Court also finds Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180 (7th Cir. 1996) instructive. In Hoosier, the court held that there is no authority for tolling a statute of limitations while a party takes unnecessary legal action regardless of whether that action was taken in good

faith. Id. at 183. "It does not provide aid to those plaintiffs who fail to research the requirements of bringing a lawsuit." Id. The court further noted that statutes of limitations continue to run during the pendency of earlier actions that are later voluntarily dismissed such that the voluntary dismissal simply leaves the situations as if the earlier action had never been filed. Id. at 184 (citing Beck v. Caterpillar, Inc., 50 F.3d 405, 407 (7th Cir. 1995); Brown v. Harthshorne Public Sch. Dist. No. 1, 926 F.2d 959, 961 (10th Cir. 1991); Davis v. Smith's Transfer, Inc., 841 F.2d 139, 140 (6th Cir. 1988); Wright & Miller, *Federal Practice and Procedure*, § 2367. The court, therefore, declined to carve a "mistake of counsel" exception into the state's limitations statute. Id.

In the present action, Plaintiffs' counsel appears to argue that it was defense counsel's obligation to advise him that Plaintiffs' action would need to be refiled within the proscribed time period. See Wright Aff. at ¶ 6; Plaintiffs' Response to defendant's Second Motion to Dismiss, p. 5.[1] Plaintiffs state that "when counsel for the parties agreed to the voluntary dismissal in the expectation that a settlement might be reached, plaintiffs' counsel was led to believe that six-month deadline would not be enforced . . . ." Plaintiffs' Response to Defendant's Second Motion to Dismiss, p. 8.

Plaintiffs also argue that "substantive changes in Arizona tort law made by the 1993 Legislature created a conflict with Plaintiffs' ability to comply with the procedural timetable established by federal law, because Plaintiffs had to file suit by July 17, 1993, to prevent the changes in substantive tort law from affecting Plaintiffs' claim." Id. at p. 3. In light

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[1] Specifically, Mr. Wright states that "at not point in our conversation did defense counsel advise me that Plaintiffs' action would need to be re-filed by July 28, 1994." Wright Aff. at ¶ 6.

of the cases set forth above, the Court finds Plaintiffs' arguments unpersuasive and declines to reconsider its ruling, even with the benefit of having reviewed the affidavit and letter. As the Court held, Plaintiffs have failed to make a legitimate case for the application of equitable tolling. See Ferreiro, 934 F.Supp. at 1377; Irwin, 498 U.S. at 95-96; Glus, 359 U.S. 231, 79 S.Ct. 760; Holmberg, 327 U.S. 392, 66 S.Ct. 582; First Alabama Bank, 981 F.2d 1226; Hoosier, 90 F.3d at 183-84. The statute of limitations therefore precludes Plaintiffs from maintaining this action.

Plaintiffs have not established mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud; that the judgment is void; or any other reason justifying relief from the judgment. On the contrary, Plaintiffs simply argue that the Court was in error on the issue it considered. Such an argument must be directed to the Court of Appeals. See Sullivan, 795 F.Supp. at 308. Accordingly, the Court denies Plaintiffs' Motion for Reconsideration and Motion to Vacate Judgment.

CONCLUSION

For the foregoing reasons,

IT IS THEREFORE ORDERED denying Plaintiffs' Motion for Reconsideration and Motion to Vacate Judgment, filed February 21, 1997. [Docs. #24-1 and #24-2].

DATED this 12 day of June, 1997.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

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JUN 23 1997
CLERK OF U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY /s/J- DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JUDY LEHMAN and MARK LEHMAN, wife and husband	)	
Plaintiffs,	)	CIV 94-0083 PHX EHC
v.	)	
	)	**ORDER**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

Before the Court is Plaintiffs' Rule 60(b)(6) Motion to Vacate Voluntary Dismissal. (dkt. 7).

I. Background

Plaintiffs are Mark and Judy Lehman. On or about February 6, 1993, Judy Lehman was injured as a result of a collision with a United States Postal truck. The truck was driven by Ted Dailey. On May 28, 1993, Plaintiffs filed a claim with the United States Postal Service.

On July 15, 1993, Plaintiffs filed a complaint in Maricopa County Superior Court. Named as defendants were: Ted Dailey; Jane Doe Dailey; John Does I-X; Black Corporations I-X; and White Partnerships I-X.

Plaintiffs' alleged in their complaint that as a direct and proximate result of the injuries sustained, Plaintiffs incurred

present and future medical expenses; suffered a loss of consortium; and suffered property damage. Plaintiffs sought compensation for medical and related expenses, pain and suffering, property damage, and costs.

A copy of the complaint in the state action was received by the United States Attorney on January 10, 1994. On January 11, 1994, the state action was removed to this Court and the United States was substituted as Defendant. (This action shall hereinafter be referred to as "Lehman I").

On January 21, 1994, the Postal Service issued a letter denying Plaintiffs' administrative claim. On March 9, 1994, prior to the filing of an answer, Plaintiffs filed a Notice of Dismissal, without prejudice, pursuant to Rule 41(a)(1).

On February 3, 1995, Plaintiffs filed a second action in Lehman v. United States, CIV 95-216-PHX-SMM. (This action shall hereinafter be referred to as "Lehman II"). The complaint in Lehman II arises from the same set of facts and alleges the same causes of action as Lehman I. Defendants filed two motions to dismiss in Lehman II. The first motion was for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). This motion was denied without prejudice to refiling pursuant to Fed. R. Civ. P. 12(b)(6). The 12(b)(6) Motion was granted in favor of Defendant. The Court found that the action was barred by 28 U.S.C. § 2401(b), the applicable statute of limitations. Judgment was entered for Defendant on February 6, 1997.

Plaintiffs in Lehman II filed a Notice of Appeal with the Ninth Circuit on April 4, 1997. Plaintiffs also filed a Motion for Reconsideration pursuant to Fed. R. Civ. P. 59(e) which was denied by order filed on June 16, 1997. (Lehman II, dkt. 36).

On March 6, 1997, almost three years after the voluntary dismissal was filed, Plaintiffs filed a Motion to Vacate the Voluntary Dismissal in Lehman I pursuant to Fed. R. Civ.

P. 60(b)(6). Plaintiffs contend that due to significant changes in Arizona's tort law, they filed an action in state court to protect Plaintiffs' interest in the event that the driver of the postal truck was not acting within the scope of his employment. Plaintiffs contend that although the action was filed in July 1993, it was not served until after the six month period required by 28 U.S.C. § 2675(a) had passed. Therefore, when Lehman I was removed to this Court, the requirements of the Federal Tort Claim Act had been satisfied.

Plaintiffs argue that Lehman I was voluntarily dismissed based on an agreement with defense counsel to allow settlement negotiations to resume when the full extent of Mrs. Lehman's injuries became known. Based on these negotiations, Plaintiffs contend that they were led to believe that Defendant would not attempt to assert the six (6) month statute of limitations provided by 28 U.S.C. 2401(b) and 2675(a) as a defense to a second lawsuit. However, after Lehman II was filed, Defendant moved to dismiss on these grounds. Plaintiffs maintain that the only efficient way to resolve this dispute and prevent injustice is to reinstate Lehman I pursuant to Rule 60(b)(6).

Defendant does not dispute that at the time Lehman I was filed it was jurisdictionally sufficient. However, Defendant contends that Plaintiffs have failed to establish their entitlement to Rule 60 relief. Defendant maintains that the relief Plaintiffs request must be sought within one year of the voluntary dismissal--not almost three years later. Defendant argues that Plaintiffs have failed to demonstrate exceptional circumstances establishing that they were not at fault in failing to refile Lehman II within the applicable statute of limitations.

Plaintiffs' Reply argues that Defendant's own conduct constitutes exceptional circumstances which justify Rule 60 relief. Plaintiffs contend that Defendant led them to believe

that the Postal Service would settle this claim, and only dismissed this action to allow Mrs. Lehman's condition to stabilize. Plaintiff further argues that they did not have notice that Defendant would not honor this agreement until after Lehman II was filed and another Assistant United States Attorney ("ASUA") assumed responsibility for this action. Plaintiffs argue that the newly assigned ASUA repudiated or breached the agreement by moving to dismiss Lehman II on jurisdictional grounds.

Plaintiffs requested oral argument on their Motion to Vacate. Pursuant to Order of April 15, 1997, this Court set oral argument for June 9, 1997 and asked the parties to file separate memoranda on whether the doctrine of res judicata applied to this action. (dkt. 13). These memoranda were submitted on May 19, 1997. Oral argument was held on June 9, 1997 and the matter was taken under advisement.

II. Discussion

Pursuant to 28 U.S.C. § 2401(b), a tort claimant must present his claim against the United States to the appropriate federal agency within two years of the date it accrues. An action against the United States can not be commenced until the agency has disposed of it, or six months have passed and the agency has not ruled on the claim. 28 U.S.C. § 2675(a).

In this case, Mrs. Lehman's injury occurred on February 6, 1993. Plaintiffs presented their claim to the U.S. Postal Service on May 28, 1993. Suit against the driver of the postal truck was filed in state court on July 15, 1993, but the complaint was not served until December 1993 or January 1994. The action was removed to federal court and the United States was substituted as a party on January 11, 1994.

The Ninth Circuit has held that "jurisdiction under section 2675(a) is determined as of the date that the Attorney

General removes the suit to federal court, rather than the date the plaintiff files the action against the driver in state court." Staple v. United States, 740 F.2d 766, 768 (9th Cir. 1984). Therefore, at the time Lehman I was removed to this Court, it was jurisdictional sufficient. Thus, the real issue before this Court is whether Plaintiffs have met their burden under Fed. R. Civ. P. 60(b) to vacate the voluntary dismissal.

Rule 60(b) of the Federal Rules of Civil Procedure states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, release, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment. **The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.**

(emphasis added).

Plaintiffs move to vacate under clause (6) of Rule 60(b) - any other reason justifying relief from the operation of

judgment. Plaintiffs contend that the former ASUA led them to believe that Defendant would not attempt to assert the statute of limitations as a defense to a subsequent lawsuit. In support of their Motion, Plaintiffs submit the affidavit of H. Michael Wright, who formerly represented Plaintiffs in this matter.

Mr. Wright's affidavit states in relevant part:

> Based on our conversation, defense counsel and I agreed that the action would be voluntarily dismissed until Ms. Lehman's medical condition had stabilized, at which point settlement negotiations with the Postal Service would resume.
>
> Although I knew that the lawsuit would need to be re-filed within two years of the February 6, 1993, collision, at no point in our conversation did defense counsel advise me that Plaintiffs' action would need to be re-filed by July 28, 1994.

Plaintiffs' Reply, Exh. A at ¶¶4-5 (dkt. 12).

Defendant did not present the Court with the affidavit of the former ASUA assigned to this matter. Defendant, however, argued at the June 9, 1997 hearing that such affidavit is unnecessary. Defendant contends that even assuming the validity of Plaintiffs' claims, Plaintiffs' reason for relief is covered by clauses (1) and/or (3) of Rule 60(b), and as such needed to have been brought within one year of the voluntary dismissal. See Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd., 507 U.S. 380, 393 (1993).

Defendant further argues that in order to qualify for relief under clause (6) of Rule 60(b), Plaintiffs must demonstrate both injury and circumstances beyond their control which prevented timely action to protect their interests. Pioneer Inv. Serv. Co. 507 U.S. at 393 ("To justify relief under subsection (6) a party must show 'exceptional circumstances' suggesting that a party is

faultless in the delay") (citing Ackermann v. United States, 340 U.S. 193, 197-200 (1950); Klapprott v. United States, 335 U.S. 601, 613-614 (1949)). Defendant contends that Plaintiffs have failed to withstand this scrutiny. Defendant argues that Plaintiffs' choice to dismiss Lehman I and failure to refile Lehman II within the statutorily prescribed time frame does not present circumstances beyond Plaintiffs' control. Moreover, Defendant contends that the former ASUA is not obligated to explain to Plaintiffs' counsel when a matter needs to be refiled.

There has been no evidence presented to this Court that the former ASUA and counsel for Plaintiffs entered into a formal written or oral agreement that if Lehman I were dismissed, Plaintiffs' counsel could refile Lehman II at any time in the future without regard for the statute of limitations. In addition, in their Reply, Plaintiffs' state:

> Plaintiffs' counsel does not claim that the 1994 agreement that resulted in the voluntary dismissal was procured through fraud, misrepresentation, or other misconduct by the first Assistant U.S. Attorney assigned to this case. Nor does Plaintiffs' counsel claim that the 1994 agreement and the voluntary dismissal were the result of mistake, inadvertence, surprise, or excusable neglect.

Plaintiffs' Reply, at 4. (dkt. 12). Plaintiffs have failed to demonstrate circumstances justifying relief under Fed. R. Civ. P. 60(b).

Accordingly,

IT IS ORDERED denying Plaintiffs' Motion to Vacate Voluntary Dismissal. (dkt. 7).

DATED this 23 day of June, 1997.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

FILED
NOV 17 1998
CATHY CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDY LEHMAN, wife; MARK LEHMAN, husband,	)	Nos.97-15695
	)	97-16454
Plaintiffs-Appellants,	)	
	)	D.C. Nos.
v.	)	CV 95-00216-SMM
	)	CV 94-00083-EHC
UNITED STATES OF AMERICA,	)	
	)	
	)	ORDER
Defendant-Appellee.	)	
	)	

Before: BRUNETTI, TASHIMA, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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FEB 6 1997
CLERK OF U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY /s/J- DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JUDY LEHMAN and MARK LEHMAN, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	CIV 95-00216-SMM **JUDGMENT IN A CIVIL CASE**

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to hearing before the court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss having been granted, that plaintiffs take nothing and the complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 6th day of February, 1997.

RICHARD H. WEARE
Clerk of Court/DCE
By: /s/ Julie Honanie
Deputy Clerk

28 U.S.C. § 2401

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2675

28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

S. Rep. No. 1327, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Admin. News 2515.

TORT CLAIMS
TORT CLAIMS—AGENCY CONSIDERATION
House Report (Judiciary Committee) No. 1532, May 16, 1966 [To accompany H.R. 13650]
Senate Report (Judiciary Committee) No. 1327, June 24, 1966 [To accompany H.R. 13650]
Cong. Record Vol. 112 (1966)
DATES OF CONSIDERATION AND PASSAGE
House June 6, 1966
Senate June 27, 1966
The Senate Report is set out.

SENATE REPORT NO. 1327

THE Committee on the Judiciary, to which was referred the bill (H.R. 13650) to amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to provide authority to the heads of Federal agencies for administrative settlement of tort claims against the United States. Settlements for more than $25,000 must have the prior written approval of the Attorney General or his designee. A claim would have to be filed with the agency concerned within 2 years after it accrues and any tort action must be brought within 6 months after final denial of the administrative claim. The bill would increase the limits for attorneys' fees in cases of administrative settlement from 10 to 20 percent and from 20 to 25 percent of amounts paid after suit is begun.

STATEMENT

A similar Senate bill, S. 3162, was introduced by Senator Sam J. Ervin, Jr.

In its favorable report on the bill the Committee on the Judiciary of the House of Representatives said:

> The bill, H.R. 13650, is one of a group of three bills introduced in accordance with the recommendations of an executive communications transmitted to the Congress by the Department of Justice. The committee has considered these bills along with the bill H.R. 14182, providing for the award of costs in litigation involving the Government. These four bills have the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government.
>
> This bill, H.R. 13650, with the two bills, H.R. 13651 and H.R. 13652, also introduced as recommended by the Department of Justice, are intended to improve the disposition of monetary claims by and against the Government. These are the matters which now comprise the bulk of civil litigation involving the Government. The proposals embodied in H.R. 13650 are intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. In accomplishing these purposes, the more expeditious procedures provided by this bill will have the effect of reducing the number of pending claims which may become stale and long delayed because of the extended time required for their consideration. The committee observes that the improvements contemplated by the bill would not only benefit private litigants, but would also be beneficial to the courts, the agencies, and the Department of Justice itself.

The Federal Tort Claims Act passed in 1946 made it possible for a person injured through the negligence or wrongful act of a Government employee to file suit against the United States for damages resulting from the injury when the employee was acting within the scope of his employment. The codified provisions of that act now contained in Title 28 of the United States Code provide for administrative settlement only in cases where the claim is for $2,500 or less. For claims over that amount, the individual has no alternative but to file suit. At a hearing conducted with reference to this bill on April 6, 1966, the Department of Justice presented testimony which included statistics which underscore the need for procedures which will permit early settlement of tort cases. At the hearing, it was noted that thousands of suits have been filed under this act and each year the Government pays out millions of dollars to persons who have brought suit against the United States. At that hearing, it was pointed out that a large number of cases are settled prior to trial. In the fiscal year 1965, the Department of Justice settled 731 tort cases after suit had been instituted. The claims in these cases total $24 million, while the cases were settled for a total of $6 million. Where the cases resulted in judgment against the Government, the record for the same year showed that there were 169 judgments which totaled approximately $4 million. The original claims as to these 169 cases totaled almost $24 million. Therefore, it is established that of meritorious claims filed against the Government under the tort claims provisions of title 28, about 80 percent are settled prior to actual trial.

The committee has been supplied with information which indicates that the same trend is evidenced in connection with private tort litigation. A recent study indicated that each year in New York City an average of

193,000 claimants seek compensation for bodily injuries. Of this number 39,000 settle or abandon their claims without consulting counsel, 77,000 settle or abandon their claims after consulting counsel but without instituting suit. The remaining 77,000 sue. Of this latter class of cases, 7,000 reach trial, of which 2,500 go all the way to verdict. The study thus indicates that in private practice where prelitigation settlements are allowed, only 40 percent of claimants for personal injuries file suit and of these cases, less than 10 percent reach trial and only 3 percent go to verdict.

The Department of Justice, in recommending this bill referred to its experience under the Federal Tort Claims Act which established that of all cases filed under the act, 80 percent are settled prior to trial. Tort claims against the Government for the most part arise in connection with the activities of a few agencies. These agencies include the Post Office Department, the Defense Department, the Veterans' Administration, the Department of the Interior, and the Federal Aviation Agency. These agencies therefore have a large degree of experience in settling such claims. The Justice Department recommended the procedure embodied in H.R. 13650 requiring all claims to be presented to the appropriate agency for consideration and possible settlement before a court action could be instituted. This procedure would make it possible for the claim first to be considered by the agency whose employee's activity allegedly caused the damage. That agency would have the best information concerning the activity which gave rise to the claim. Since it is the one directly concerned, it can be expected that claims which are found to be meritorious can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation. The committee observes in this connection

that under the present provisions of law, even if the agency finds that it is clearly liable and desires to settle the claim quickly in the interest of justice and fairness, it cannot do so if the claim is for more than $2,500. Rather, a suit must be filed and a settlement negotiated after the action is begin in a U.S. district court.

The requirement of an administrative claims as a prerequisite to suit has numerous precedents in statutes governing tort claims against municipalities. These laws often provide that a municipality must be given notice of an accident within a fixed time. The purpose of this notice has been summarized as being—

"* * * to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit (McQuillin, Municipal Corporations (3d ed.), section 53.153)."

In this connection, it is relevant to note that section 1-923 of the District of Columbia Code includes the following language concerning suits for damages caused by employees driving vehicles—

"* * * No suit shall be instituted * * * unless the claimant shall have first given notice to the District and shall have presented to the District in writing a claim for money damages in connection therewith, and the District has had 6 months from the date of such filing within which to make final disposition of such claim * * *."

Another example of a precedent in State practice is to be found in the laws of the State of Iowa (Laws of the 61st General Assembly, ch. 79 (Mar. 26, 1965)) which provide requirements very similar to those provided in H.R. 13650. This statute provides for tort claims against the State of Iowa and requires that a claim must first be presented to a State appeal board and further includes language providing that no suit is permitted unless the

appeal board has made final disposition of the claim.

The committee in recommending this legislation further points out that it grants the agencies of Government sufficient authority to make the administrative settlements a meaningful thing. The bill would provide the agencies with the authority to make settlement offers which could result in settlement in a large percentage of tort claims cases where under today's conditions the present $2,500 limit means that administrative settlements are limited to property damage claims and relatively minor personal injury claims. There is good reason to believe that even in many of these cases a claimant may decide to file suit because of the present limits upon administrative settlement. This is because as soon as the case is filed, the Government can negotiate a settlement without regard to that limitation. It does not appear that this procedure is conducive to efficient claims administration. The filing of the suit and the consequent expense to the Government in preparing the case would appear to be unnecessarily involved when the case is a proper one for early settlement.

Another objective of this bill is to reduce unnecessary congestion in the courts. Each year between 1,500 and 2,000 new tort cases are filed in the court against the Government. The information available to this committee indicates that there is little likelihood that there will be any real decrease in the numbers of this type of claim.

Accordingly, in the light of these considerations the committee has recommended these amendments to the Tort Claims Act to authorize the head of each Federal agency to settle or compromise any tort claim presented to him which arises out of the negligent or wrongful act of an employee of that agency who was acting within the

scope of his employment at the time of the act. This authority of the agency head will be exclusive for settlement up to $25,000. Above that amount, the settlement must have the prior written approval of the Attorney General or his designee as well as of the agency head.

The procedure provided in the bill would require a claimant to file his claim with the agency within 2 years after the claim accrues. The agency will then have 6 months to consider the claim prior to granting or denying it. Final denial in this connection includes instances where partial approval of a claim results in an offer unacceptable to the claimant and rejected by him. Thus the end result would be a denial of the claim. However if the agency fails to act in 6 months, the claimant may at his option elect to regard this inaction as a final denial and proceed to file suit. It is obvious that there will be some difficult tort claims that cannot be processed and evaluated in this 6-month period. The great bulk of them, however, should be ready for decision within this period. In some cases where the agency does not reach a decision in 6 months, the claimant may feel that the agency is sincerely seeking to reach a fair decision. Under such circumstances, the claimant might wish not to break off negotiations and file suit. Therefore even though this 6-month period may prove insufficient in some instances, the committee does not believe that this period ought to be enlarged to attempt to insure time for final decision on all claims. This is the same position stated by the Department of Justice at the hearing.

The bill will not assign novel tasks to the agencies. They now investigate all accidents involving their employees, prepare litigation reports on all tort cases, suggest Government defenses to claims, and, at the request of the Department of Justice, comment on all

settlement offers presented to the Department. The views of the affected agency have always been taken into account by the Department in accepting or rejecting an offer of settlement.

As has been noted, tort claims against the Government have arisen primarily in a few agencies that have extensive dealings with the public or whose operations require the use of a large number of motor vehicles. For example, as of the end of October 1965, 81 percent of the tort suits then pending against the Government arose out of the activities of only five agencies—Defense, Post Office, Federal Aviation Agency, Interior, and the Veterans' Administration. This concentration of tort claims has led to the development in the agencies of substantial expertise in the problems involved in tort litigation. The Post Office, probably because of its use of more than 80,000 vehicles, has had to pass upon a very large number of tort claims. In 1965, the Post Office processed over 5,000 claims in the dollar range of $100 to $2,500 and allowed 3,800 of them. Postal officials in the field allowed another estimated 5,200 claims for less than $100. In addition, the Post Office employees assisted the Justice Department in connection with the handling of about 900 cases in Federal courts, cases which involved claims against the Government of over $36 million and which involved alleged torts of postal employees. The point is that the Post Office and other agencies are now actually performing investigating and evaluating work on a large volume of tort claims against the Government.

The procedure set forth in this bill will not become effective until 6 months after the enactment date. In this period of time the agencies can develop procedures and instruct personnel for these new responsibilities. The Civil Division of the Department of Justice will be

available for advice and assistance to any agency desiring it and will furnish suggestions as to how the claims procedures should be handled. The committee notes that the Civil Division will undoubtedly continue to provide similar assistance and legal counsel when required concerning tort claims and the legal questions involved.

The authority to settle claims for up to $25,000 and, above that amount, with the prior written approval of the Attorney General, seems sensible. If a satisfactory arrangement cannot be reached in the matter, the claimant can simply do as he does today—file suit.

Agency settlement of substantial numbers of tort claims would enable the Civil Division to give greater attention to those cases which involve difficult legal and damage questions in such areas as medical malpractice, drug and other products liability, and aviation accidents. These areas of litigation are expanding at a steady pace.

The part of attorneys, both Government and private, will be important in effecting settlements as provided in this bill. These tort claims will, as in the past, in many of the cases continue to require an attorney acting on behalf of the claim. To assure competent representation and reasonable compensation in these matter, the proposed bill authorized increases in the attorneys' fees allowable under successful prosecution of these claims: 20 percent of the agency award and 25 percent of a court award or settlement after the filing of a complain in court.

The bill increases the allowable fee in agency proceedings from the present 10 to 20 percent. The committee feels this increase will encourage attorneys to take these claims. In recommending this increase the committee points out that increased work will be required in many of the larger claims. Also, this amendment will bring the fees more nearly in line with

those prevailing in private practice. Similarly, allowable fees for claims involving litigation have been raised from 20 to 25 percent.

CONCLUSION

In the light of the considerations referred to in the executive communication and outlined in this report, the committee recommends that the bill, as amended, be considered favorably.

ANALYSIS OF SECTIONS OF THE BILL

Section 1

This section amends section 2672 of title 28 of the United States Code, which concerns administrative settlements of tort claims against the United States.

Subsection (a) amends the first paragraph of section 2672 so as to authorize the head of each Federal agency or its designee to settle a tort claim for $25,000 or less in accordance with regulations prescribed by the Attorney General. Any claim in excess of that amount could be settled under the authority of the section only after written approval has been given by the Attorney General or his designee to the settlement.

Subsection (b) amends the second paragraph of section 2672 by inserting the words "compromise" and "settlement" to the present language of the paragraph so as to refer to the administrative settlement authority added by subsection (a).

Subsection (c) amends the third paragraph of section 2672 to refer to the settlement authority added to the section by subsection (a) as well as the compromise authority presently provided for the compromise and settlement of court actions in section 2677. In short, the new language permits the

payment of final settlements effected under the authority added by the bill, and authorizes the use of appropriations of funds made available for such purposes. A committee amendment adds a sentence to make it clear that the heads of agencies retain the authority to pay settlements for $25,000 or less out of appropriations available to that agency.

Section 2

Subsection (a) amends section 2675 of title 28 which concerns disposition of an administrative claim prior to the commencement of a court action. The new language would require that an administrative claim be filed with the agency or department in each instance prior to filing a court action against the United States. After rejection of the claim, the claimant would be free to institute an action against the United States in a district court. After the claim has been presented to the agency and 6 months passes without final disposition of the claim, the claimant is expressly given the option to consider the claim as denied and to file suit. A sentence is added to this subsection by committee amendment to make it clear that the provisions of the subsection concerning the filing of a prior administrative claim do not apply to claims asserted in actions under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsection (b) amends subsection (b) to section 2675 by deleting the first sentence of the subsection. The sentence is in effect replaced by the provision of subsection (a) of section 2675, as amended, which states that after 6 months without final action, the individual at his option can deem the claim to be finally denied and be free to commence suit.

Section 3

This section removes the requirement that settlements of tort suits must be made with the "approval of the court." The committee recognizes that as a practical matter, the decision to settle a case must be made by the Justice Department and the language change recognizes this fact.

. . . .

Section 7

This section amends the provisions of section 2401, the limitations section, to conform the section to the amendments added by the bill. The amendments have the effect of simplifying the language of section 2401 to require that a claimant must file a claim in writing to the appropriate Federal agency within 2 years after the claim accrues, and to further require the filing of a court action within 6 months of notice by certified or registered mail of a final decision of the claim by the agency to which it was presented.

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H.R. Rep. No. 1532, 89th Cong., 2d Sess. (1966)

89TH CONGRESS HOUSE OF REPRESENTATIVES REPORT
2d Session No. 1532

AMENDING THE FEDERAL TORT CLAIMS ACT TO AUTHORIZE INCREASED AGENCY CONSIDERATION OF TORT CLAIMS AGAINST THE GOVERNMENT, AND FOR OTHER PURPOSES

May 16, 1966. -- Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ASHMORE, from the committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 13650]

. . . .

ANALYSIS OF SECTIONS OF THE BILL

. . . .

Section 2

Subsection (a) amends section 2675 of title 28 which concerns disposition of an administrative claim prior to the commencement of court action. The new language would require that an administrative claim be filed with the agency or department in each instance prior to filing a court action against the United States. After rejection of the claim, the claimant would be free to institute an action against the United States in a district court. After the claim has been presented to the agency and 6 months passes without final disposition of the claim, the claimant is expressly given the option to consider the claim as denied and to file suit. A sentence is added to this subsection by committee amendment to make it clear that the provisions of the subsection concerning the filing of a prior administrative

claim do not apply to claims asserted in actions under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsection (b) amends subsection (b) of section 2675 by deleting the first sentence of the subsection. This sentence is in effect replaced by the provision of subsection (a) of section 2675, as amended, which states that after 6 months without final action, the individual at his own option can deem the claim to be finally denied and be free to commence suit.

. . . .

Section 7

This section amends the provisions of section 2401, the limitations section, to conform the section to the amendments added by the bill. The amendments have the effect of simplifying the language of section 2401 to require that a claimant must file a claim in writing to the appropriate Federal agency within 2 years after the claim accrues, and to further require the filing of a court action within 6 months of notice by certified or registered mail of a final decision of the claim by the agency to which it was presented.

. . . .

STATEMENT

The bill, H.R. 13650, is one of a group of three bills introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Department of Justice. The committee has considered these bills along with the bill H.R. 14182, providing for the award of costs in litigation involving the Government. These four bills have the common purpose of providing for as more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government.

This bill, H.R. 13650, with the two bills, H.R. 13651 and H.R. 13652, also introduced as recommended by the

Department of Justice, are intended to improve the disposition of monetary claims by and against the Government. These are the matters which now comprise [6] the bulk of civil litigation involving the Government. The proposals embodied in H.R. 13650 are intended to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States. In accomplishing these purposes, the more expeditious procedures provided by this bill will have the effect of reducing the number of pending claims which may become stale and long delayed because of the extended time required for their consideration. The committee observes that the improvements contemplated by the bill would not only benefit private litigants, but would also be beneficial to the courts, the agencies involved, and the Department of Justice itself.

. . . .

Another objective of this bill is to reduce unnecessary congestion in the courts. Each year between 1,500 and 2,000 new tort cases are filed in the court against the Government. The information available to this committee indicates that there is little likelihood that there will be any real decrease in the numbers of this type of claim.

Accordingly, in the light of these considerations the committee has recommended these amendments to the Tort Claims Act to authorize the head of each Federal agency to settle or compromise any tort claim presented to him which arises out of the negligent or wrongful act of an employee of that agency who was acting within the scope of his employment at the time of the act. This authority of the agency head will be exclusive for settlement up to $25,000. Above that amount, the settlement must have the prior written approval of the Attorney General or his designee as well as of the agency head.

The procedure provided in the bill would require a claimant to file his claim with the agency within 2 years after the claim accrues. The agency will then have 6 months to consider the claim prior to granting or denying it. Final denial in this connection includes instances where partial approval of a claim results in an offer unacceptable to the claimant and rejected by him. Thus the end result would be a denial of the claim. However if the agency fails to act in 6 months, the claimant may at his option elect to regard this inaction as a final denial and proceed to file suit. It is obvious that there will be some difficult tort claims that cannot be processed and evaluated in this 6-month period. The great bulk of them, however should be ready for decision within this period. In some cases where the agency does not reach a decision in 6 months, the claimant may feel that the agency is sincerely seeking to reach a fair decision. Under such circumstances, the claimant might wish not to break off negotiations and file suit. Therefore even though this 6-month period may prove insufficient in some instances, the committee does not believe that this period ought to be enlarged to attempt to insure time for final decision on all claims. This is the same position stated by the Department of Justice at the hearing.

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CHANGES IN EXISTING LAW

In compliance with paragraph 2 of clause 3 of rule XIII of the rules of the House of Representatives, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 28.--JUDICIARY AND JUDICIAL PROCEDURE

* * * * * * *

"**§ 2401. Time for commencing action against United States.**

"(a) * * *

"(b) A tort claim against the Untied States shall be forever barred unless [action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500,] it is presented in writing to the appropriate Federal agency within two years after such claim accrues [or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $2,500 has been presented in writing to the appropriate Federal agency within that period of time, suite thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.] *or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.*"

. . . .

"**§ 2675. Disposition by federal agency as prerequisite; evidence.**

"(a) An action shall not be instituted upon a claim against the United States [which has been presented to a federal agency,] for money damages for injury or loss of property or personal

injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [authority] *office or employment,* unless [such federal agency has made final disposition of the claim.] *the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim or counterclaim.*

"(b) [The claimant, however, may, upon fifteen days written notice, withdraw such claims from consideration of the federal agency and commence action thereon.] Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

"(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages."

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"§ **2675. Compromise.**

"The Attorney General *or his designee* [, with the approval of the court,] may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

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